INDUSTRIAL RESINS (M) SDN. BHD.

v.

POLYCOM ENTERPRISE SDN. BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[SUIT NO. 23-265 OF 1987]
22 AUGUST 1991

CIVIL PROCEDURE: *Summary judgment - Whether further affidavit-in-reply on the aftermath of the hearing for summary judgment is admissable - Whether the further affidavit is part of the evidence - Dilatory action by the 2nd defendant.*

This is an appeal by the second defendant against the order of the SAR made on 21 October 1989 entering summary judgment against him as guarantor for the outstanding liabilities due by the first defendant company to the plaintiff company.

The Court found as a preliminary issue in the appeal whether the further affidavit-in-reply filed by the second defendant on the aftermath of the hearing of the application for summary judgment is admissible.

The second substantial question that had to be decided in this appeal was whether the second defendant, who was managing director of the first defendant company, is liable for the judgment debt due by the first defendant company which had taken no steps whatsoever in appealing against the order of the summary judgment made against it.

It was contended that the second defendant is liable to satisfy this judgment debt of the first defendant company, pursuant to a letter of guarantee executed by him some time in 1984.

The matter before the Court was whether the letter that had been filed *vide* the affidavit-in-reply sufficiently nullifies the second defendant's guarantee.

Held:

[1] That the further affidavit was part of the evidence that was considered by the SAR when she heard the O. 14 application against the second defendant and can therefore be properly considered in the present appeal as it is not fresh evidence which has been brought for the purpose of the appeal and the authorities.

[2] The affidavit affords no evidence that a second guarantee or collateral had been provided to nullify the second defendant's guarantee which clearly stipulates that the second defendant continues to be liable for all outstanding accounts and/or liabilities incurred by the first defendant company.

[3] In my view, the affidavit does not in any way afford proof that any collateral had in fact been provided but only indicates a suggestion by the plaintiff to the first defendant company, for the specific attention of the second defendant, how best a collateral could be provided for the variation to safeguard the recovery of the debt owed by the first defendant company to the plaintiff.

[4] The Court has considered the defence that has been raised in the further affidavit-in-reply but in the light of the second defendant's position as managing director of the first defendant company this ground bears no merit whatsoever.

[Appeal allowed with costs.]

Cases referred to:
Daniel s/o D. William v. Luhat Wan & 3 Ors. [1990] 1 CLJ (Rep) 762 ***(dist)***
Sun Hip Woh Sdn. Bhd. v. Cheah Soong Yeng [1990] 3 CLJ (Rep) 122 ***(dist)***
Malaysia Building Society Bhd. v. Chee Eng Shot & 2 Ors. [1990] 2 CLJ (Rep) 437 ***(dist)***

For the plaintiff - Gana Muthusamy; M/s. Gana Muthusamy & Co.
For the defendant - L. Parthiban; M/s. L. Parthiban & Associates

JUDGMENT

LC Vohrah J:

This is an appeal by the second defendant against the order of the SAR made on 21 October 1989 entering summary judgment against him as guarantor for the outstanding liabilities due by the first defendant company to the plaintiff company.

The preliminary question that has to be answered in this appeal is whether the further affidavit-in-reply, encl. 22, filed by the second defendant after the hearing of the application for summary judgment had begun is admissible in this appeal. Counsel for the plaintiff has contended that it is not admissible because it was filed on 20 June 1988 after arguments had been heard by the SAR and after she had made an order for summary judgment against the first defendant company on 20 January 1988. It is to be noted that she made the order for summary judgment against the second defendant only on 21 October 1989. The present Counsel for the parties in the appeal are different from those who represented the parties at the O. 14 hearing. Why the SAR rendered her decision against the first defendant company on one date and against the second defendant nearly 2 years later she has not explained. Counsel for the second defendant however has stated that the further affidavit was filed with leave of the SAR whilst Counsel for the plaintiff has said that according to his instructions there was no direction given by the SAR for it to be filed. I take the view that because the further affidavit was filed on 20 June 1988 after she had rendered her decision only against the first defendant company on 20 January 1988, she must have postponed her decision in respect of the second defendant in order to enable him to file the affidavit probably with the consent of both the Counsel for the parties at that time and, consequently, she would have considered it before she gave her decision on 21 October 1989 when she entered summary judgment also against him. Accordingly I am of the view that the further affidavit was part of the evidence that was considered by the SAR when she heard the O. 14 application against the second defendant and can therefore be properly considered in the present appeal as it is not fresh evidence which has been brought for the purposes of this appeal and the authorities, namely *Daniel s/o D. William v. Luhat Wan & 3 Ors.* [1990] 1 CLJ (Rep) 762, *Sun Hip Woh Sdn. Bhd. v. Cheah Soong Yeng* [1990] 3 CLJ (Rep) 122 and *Malaysia Building Society Bhd. v. Chee Eng Shot & 2 Ors.* [1990] 2 CLJ (Rep) 437 submitted by Counsel for the plaintiff do not apply.

Having disposed of the preliminary issue in favour of the second defendant, the substantial question that has to be decided in this appeal is whether the second defendant, who was managing director of the first defendant company, is liable for the judgment debt due by the first defendant company which had taken no steps whatsoever in appealing against the order of the summary judgment made against it in the sum of RM418,671.21 cents together with interest and costs as stated in the sealed judgment, encl. 23. It is the contention of Counsel for the defendant that the second defendant is liable to satisfy this judgment debt of the first defendant company by virtue of the letter of guarantee executed by him on 8 October 1984 in the following terms:

To:

Industrial Resins (M) Sdn. Bhd.
No. 78 & 8, Jalan Hasil off Jalan Tampoi, P.O. Box 294,
Johor Bahru, Johor.

In consideration of Industrial Resins (M) Sdn. Bhd. (hereinafter called "the company") agreeing at my/our request to provide credit facility to Polycom Enterprise Sdn. Bhd. of 7 Jalan Bakti, Larkin Industrial Estate, Johore Bahru, Johor. (hereinafter called "the principal debtor"). I/we hereby jointly and severally guarantee as principal and not merely as surety, to pay the company to the extent of Malaysian Ringgit Six Hundred Thousand (RM600,000) only after a credit period (being a grace period) of six (6) months given to the principal debtor for any outstanding account and liabilities incurred by the principal debtor.

This guarantee shall be a continuing guarantee to the company (within the limits aforesaid) for the whole debt that shall be contracted by the said principal debtor with the company in respect of goods to be supplied to him by the company and shall not merely be applicable to so much thereof as shall be co-extensive with the aforesaid limits of my/our liability.

The company shall be at liberty without discharging me/us from liability hereunder to grant time or other indulgence to the principal debtor in respect of goods supplied to the principal debtor. The company is to treat the principal debtor in all respects as though the principal debtor and I/we were jointly and severally liable as principal debtors to the company.

All dividends compositions and payments received by the company from the said principal debtor or from his estate whether in bankruptcy or otherwise shall be taken and applied by the company as payment in gross and not as appropriated or attributable to any specific part or item of the said money even if appropriated thereto by the person otherwise entitled so to appropriate.

The company may at any time or times at its absolute discretion and without giving any notice whatsoever to me/us refuse further credit or other indulgence to the said principal debtor without discharging or impairing my/our liability under this guarantee.

I/we hereby covenant that I/we shall prior to my/our revocation of this guarantee arrange a replacement guarantor/guarantors acceptable to the company and shall procure the replacement guarantor/guarantors to execute a guarantee substantially in the form of this guarantee. Until execution of the new guarantee by the replacement guarantor/guarantors and settlement in full by the principal debtor of all accounts and liabilities incurred before the date of execution of the new guarantee, I/we shall continue to be liable for all outstanding accounts and or liabilities incurred by the principal debtor.

This guarantee shall be enforceable against me/us notwithstanding that any negotiable instruments or other securities at the time of proceedings being taken against me/us on this guarantee be outstanding or in circulation.

This guarantee shall not be discharged or prejudiced by any partial payments or settlement of accounts or by the existence of a credit balance in favour of the principal debtor at any time or by the discharge of the principal debtor by the operation of law or for any other reason.

This guarantee shall be in addition to and it shall not be in any way prejudiced or affected by any collateral, or other security now or hereafter held by the company for all or any part of the money hereby guaranteed. Such collateral, lien or other security to which the company may be entitled, shall also not be in any way prejudiced or affected by the guarantee.

Any accounts, settled between the company and the principal debtor regarding any outstanding amounts due to the company at any time will be accepted by me/us as conclusive evidence of the extent of my/our liability under this guarantee.

No charges (sic) whatsoever in the constitution of your firm shall impair or discharge my/our liability under this guarantee notwithstanding any enactment in force. In the case of the principal debtor or myself/ourselves being a firm, any change in the constitution of such firm shall not affect my/our liability under this guarantee.

In order to give effect to this guarantee I/we declare that the company shall be at liberty to act as though I/we were the principal debtor and I/we hereby waive all my/our rights of suretyship which may at any time be inconsistent.

This guarantee shall be binding upon my/our respective executors, administrators and personal representatives.

Dated 8 October 1984.

Signed	Signed
(i) ...	...
(Signature of Guarantor)	Signature of Witness)
Full name: Khoong Loy Kui @ Koon Chong Ui	Full name: Lai Poh Fye @ Advocate & Solicitor

I/C No. 3522521
Address: 7 Jalan Bakti,
Industrial Estate, Johore Bahru.,
Johore.

(Emphasis added)

In the said further affidavit-in-reply the second defendant averred as follows:

2. The first defendant purchased goods from the plaintiff from time to time and the plaintiff allowed the first defendant a credit limit of RM600,000 on condition that I the second defendant signed the letter of guarantee which I did and dated 8 October 1984, after giving to first defendant a credit period of 180 days to pay before enforcing payment against me and by letter dated 30 September 1985, the terms as to credit facility are varied between the plaintiff and first defendant in regard to:

(a) the credit limit be reduced from RM600,000 to RM445,000.

(b) credit period of 120 days instead of 180 days; and

(c) that the outstanding amount exceeding above reduced limit be paid.

A photocopy of the said letter of guarantee dated 8 October 1984 and letter dated 30 September 1985 are annexed and marked as "KLK1", and "KLK2" respectively.

3. Before reaching agreement for claim of reducing credit limit, I requested for the said letter of guarantee be cancelled and the plaintiff acceded to my request since the first defendant will have to pay the exceeding amount.

4. The letter of guarantee which was cancelled is further confirmed by a letter dated 21 February 1986, which said that "In view of the amount owing being huge, we suggested that some form of collateral be provided to us", since after 30 September 1985 there isn't in existence any collateral including the guarantee. A copy of the said letter is annexed hereto and marked as "KLK3".

Counsel for the second defendant has contended that by virtue of the above averments the second defendant has shown that there was an agreement that the guarantee given by the second defendant was to be cancelled upon the credit facility being varied upon the terms that the credit facility would be reduced from RM600,000 to RM450,000, the credit period

reduced from 180 days to 120 days, 1½% overdue charge to be imposed on the outstanding monthly balance and the outstanding amount exceeding the reduced limit be paid in cash by the first defendant company. However, I agree with Counsel for the plaintiff that the averments in paras. 3 and 4 have not been substantiated. The letter KLK3 dated 21 February 1986, in my view, does not in any way afford proof that any collateral had in fact been provided but only indicates a suggestion by the plaintiff to the first defendant company, for the specific attention of the second defendant, how best a collateral could be provided for the variation to safeguard the recovery of the debt owed by the first defendant company to the plaintiff. The letter affords no evidence that a second guarantee or collateral had been provided to nullify the second defendant's guarantee which clearly stipulates that the second defendant continues "to be liable for all outstanding accounts and or liabilities incurred by" the first defendant company. Having regard to the relevant affidavit evidence that has been furnished in encls. (7), (10) and (22) and the clear language of the second defendant's continuing liability I allow the appeal with costs. I must state for the sake of completeness that I have considered the defence that has been raised in para. 5 in the further affidavit-in-reply but in the light of the second defendant's position as managing director of the first defendant company this ground bears no merit whatsoever.

Also found at [1992] 1 CLJ 429